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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HAROLD WAYNE TAYLOR, Defendant and Appellant.	A095412 (Mendocino County Super. Ct. No. SCUK-CRCR-00-37366-02)

Harold Wayne Taylor (appellant) killed Patty Fansler and the 11 to 13 week-old fetus she was carrying. He did not know Ms. Fansler was pregnant, nor was her pregnancy apparent. Do these facts support an inference of implied malice sufficient to sustain a second degree fetal murder conviction? They do not, and accordingly we reverse that conviction for insufficient evidence but affirm the conviction of second degree murder of Ms. Fansler.

I. FACTS

A. *The Relationship, Breakup and Deteriorating Situation*

Appellant met Ms. Fansler in the spring of 1997. They dated and then lived together in Calpella, along with Ms. Fansler's three children. They separated in July 1998; Ms. Fansler moved out. Christy Trotter, Ms. Fansler's niece, helped her move. Trotter heard appellant threaten to kill Ms. Fansler and anyone close to her if she left him. According to Betty Sanchez, Ms. Fansler's life-long friend, appellant wanted to

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.B. through II.D.

"get back" with Ms. Fansler. He told Sanchez he could not handle the breakup, everything reminded him of her, and if he could not have her, "nobody else could."

The two spent New Year's Eve together. On January 1, 1999,[1] Lakeport Police Department Sergeant Brad Rasmussen responded to a call about a woman screaming at the Skylark Motel. Sergeant Rasmussen went to the room. Appellant opened the door. Ms. Fansler was there, in boxer shorts and a T-shirt. She was "upset and crying." Ms. Fansler said appellant raped her; Rasmussen arrested him.

In the course of the rape investigation, Ms. Fansler asked Investigator Craig Woodworth of the Lake County District Attorney's Office to register a restraining order with the Mendocino County Sheriff's Department.[2] The order was signed on January 5, and appellant was served on February 1. He did not consent to the restraining order, the stay-away order, the counseling order or the firearms restriction.

After the first of the year Ms. Fansler asked Randall Lee, manager of the Wal-Mart where she worked as an overnight stocker, to alter her shifts. She did not want appellant to know when she was working. Shortly before she was murdered, Ms. Fansler asked Lee for a transfer to the State of Washington because she was afraid of appellant.

Around the 5th or 6th of January, Richard Fansler, Ms. Fansler's ex-husband, drove Ms. Fansler to work.[3] Appellant followed them at high speeds for a mile or so.

Appellant tailgated Ms. Fansler again on two occasions on January 20. On the first occasion, when she sped up to around 75 miles per hour, he accelerated "onto her rear" and continued tailgating. Later that day he tailgated her again. At that

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[1] All further dates are in the 1999 calendar year unless otherwise indicated.

[2] Ms. Fansler lived in Mendocino County but worked in Lake County.

[3] Mr. Fansler came to Ukiah from Arizona at Ms. Fansler's request because she was scared and needed his help. Mr. Fansler would drive her to work, wait for her until she "got off," take her to the grocery store and anything else she needed.

point Ms. Fansler went to the Mendocino County Sheriff's Office, "upset and crying." She told Deputy Fletcher about the incidents, indicating appellant was "swerving behind her." She "was scared of him."

B. *Circumstances Leading up to the Offenses*

Beginning in January, Tamara Baxman, appellant's ex-wife and mother of his three children, noticed a change in him. He was agitated and bought an unusual number of presents for the children. He told them he would be going away for a long time and would not be seeing them. Around this time appellant gave his daughter a box containing all his army records and medals.

Jack Wilder was a close friend of appellant. In March appellant was living next door with Wilder's son, Brian. Appellant was "pretty mad" about the rape accusation and said he wanted to kill Ms. Fansler. Appellant also talked to Brian about confronting Ms. Fansler and "having her resign his van to him" or getting "stuff" she owed him. He told Brian he wanted to "knock her around a little bit and try to get her to see things his way."

Wilder owned a .22-caliber semiautomatic pistol and had given Brian a nine-millimeter handgun. Jack loaned the nine-millimeter to appellant. The "boys" had seen appellant with the .22, but Wilder "wasn't really concerned." Shortly before the murder, appellant talked to Wilder about throwing a gun over a cliff. Wilder also observed appellant make a silencer for a .22 and test it, many times, in the presence of company. The last time appellant test-fired a .22 with a silencer occurred after the rape allegation. Appellant was "firing it everywhere to try to perfect it." Appellant told Brian that if he wanted to kill someone he would use a .22 because of the low noise and the bullet would not exit the skull, thus causing more damage.

In February appellant began asking Brian to accompany him to Ukiah for the purpose of getting Ms. Fansler to open her door. Brian wanted "no part of it." Appellant also asked Brian's cousin, Jeremy Lugger, to knock on the door because Ms. Fansler did not know Lugger. Appellant "made it sound" like Ms. Fansler was withholding some of his property. The weekend before the murder, appellant drew a

schematic of Ms. Fansler's apartment building for Lugger. He wanted Lugger to pull the phone lines as he went through the door. Appellant said Lugger would "carry" the .22 and gave him the .22. Lugger looked at it, but took it all as "crazy talk." When Lugger last saw appellant, appellant said he would compensate them "once it was all done." Appellant also asked Brian to drive Lugger to Ms. Fansler's house so he could knock on the door. Appellant pestered Brian with two or three calls a week and left phone messages for Lugger.

On March 8 appellant showed high school classmate James Gravlee a small black handgun and left it in the pickup. Appellant also asked Gravlee to find someone to knock on Ms. Fansler's door.

C. *The March 9 Offenses*

On March 9 appellant left Brian several messages asking where he was and whether he was going to help. Instead of returning the calls, Brian asked his dad to "go talk" to appellant. Lugger also got messages from appellant that day. Lugger did not return the calls; he felt it would be better to separate from the situation completely.

Appellant went to Gravlee's home around 7:00 that evening. Gravlee drove appellant to pick up Tracy Ledridge. On the way to Ms. Fansler's apartment, appellant told Ledridge to knock on the door so he could talk to Ms. Fansler.

When they reached the apartment complex Gravlee stayed in the car. Ledridge knocked on Ms. Fansler's door. Ms. Fansler and her dog came out. Ledridge reached down to pet the dog and "felt something brush alongside me and the door closed." Ledridge went back to the car. Gravlee gave her a $100 bill and they left.

John Benback, Ms. Fansler's boyfriend, lived in apartment no. 5 with his son, John, Jr. (J.J.) That evening Ms. Fansler's son Robert and his two sisters were with the Benback family. Ms. Fansler had taken a nap there because she was afraid of appellant and felt safer at Benback's place, but returned to her own apartment to shower before work. Around 8:30 p.m. Robert and J.J. went back to Ms. Fansler's

apartment. They could not get in because the deadbolt was locked and Robert had left his key upstairs. Robert knocked on the front door. He heard a muffled scream that he thought might have been a cat. The boys tried to open the rear sliding glass door but it was locked, too. They went back to the front door and knocked some more. Robert heard more muffled screams and "realized what it was." He pounded on the window, cursed and yelled words to this effect: " 'Goddamn it, you better not hurt her.' " Robert told J.J. to run back to get his dad and the key.

Mr. Benback arrived and opened the door. Robert and J.J. positioned themselves outside to catch appellant if he tried to get away. J.J. spotted someone leaving; they gave chase. Both boys recognized appellant, but did not catch him.

Back in the apartment they found Ms. Fansler face up on the bed, bleeding. Police and emergency personnel responded to the scene. The apartment was "pretty well trashed. There was blood everywhere." A mirror had fallen from the wall near the bed. Two .22-caliber shell casings were found near the bed; one was on top of the fallen mirror.

Ms. Fansler was "neurologically dead" when she arrived at Ukiah Valley Medical Center. She died of a single gunshot wound, which entered above her left ear and never exited. There was a laceration on the back of Ms. Fansler's head, bruising on the neck and legs and her elbows were slightly bruised. The head laceration was due to "blunt forced trauma." The laceration spanned the entire scalp, at full thickness; there were chips of bone "in the depths" of the injury. The injury was consistent with being struck with the butt of a gun or suffering a bad fall on a sharp object.

The autopsy revealed that Ms. Fansler was pregnant. The fetus was between 11 and 13 weeks old and three to four inches long. The fetus died as a result of mother's death. The examining pathologist could not tell Ms. Fansler was pregnant just by observing her on the examination table.

D. *The Aftermath*

Appellant called Gravlee from a nearby store and asked for a ride back to his apartment. Appellant took off the sweatshirt he had been wearing and told Gravlee to throw it away. Appellant left; Gravlee threw the sweatshirt in the garbage.

That night appellant called Lugger around 9:30 and told him, "[I]t's done. She won't be bothering [me] anymore." Appellant also asked Lugger to kick around an alibi that the boys had seen him at a Shell station in Cloverdale.

The next morning appellant called Gravlee and asked him to retrieve a .45-caliber handgun (nine-millimeter) in some hedges a little ways from Ms. Fansler's apartment. Scared, Gravlee eventually led the police to the sweatshirt and gun and also told the police that appellant said he had shot Ms. Fansler. Police found the gun and a fanny pack with nine-millimeter and .22-caliber ammunition. A latent fingerprint analyst found appellant's right index fingerprint on duct tape around a strap attached to the holster holding the nine-millimeter gun found in the bushes. Appellant was arrested the morning of March 10.

Two months later appellant asked to speak with the lead detective. According to the detective, appellant requested help in getting the death penalty. He had made peace with himself and did not want leniency; he wanted it to be over.

E. *Defense*

Appellant was a decorated Vietnam War veteran with extensive hardcore combat and firearms experience. As a result of his service appellant received therapy; he received compensation per classification of 100 percent mental disability, and still took antidepressants. He was diagnosed with posttraumatic stress disorder (PTSD).

When Ms. Fansler moved out, she took things he believed belonged to him, including a van on which he made a $9,000 down payment. He later learned his name was not on the title as they had agreed. Appellant denied threatening Ms. Fansler or her family during the move and denied telling Sanchez if he could not have Ms. Fansler, no one could. Appellant's daughter was present during the move

and heard a little arguing, nothing serious. Appellant did not threaten Ms. Fansler, but she threw a beer bottle at his head. Later, appellant tried to talk with Ms. Fansler about the van but she refused conversation. Eventually they resumed contact and visited.

After a visit around Thanksgiving 1998, an envelope with thousands of dollars he was putting up for his daughters turned up missing. When he visited Ms. Fansler, she acknowledged having the envelope but did not return it. Instead, she gave him $500 of the money for Christmas presents. Ms. Fansler told appellant her relationship with someone else was on the rocks.

They went out on New Year's Eve. He was arrested the next morning and accused of rape. He made his court appearances and spoke with an attorney about the restraining orders. The only aspects of the restraining orders he really opposed were provisions to seek counseling and relinquish firearms. Appellant never tailgated Ms. Fansler.

Appellant testified that in early 1999, for the first time in his life, he was not able to pay his bills. He started pressing everyone for the money they owed him, but no one was coming through so he decided to go see Ms. Fansler. Others observed that he was more stressed out; something was different.

Although appellant admitted that he asked others to knock on Ms. Fansler's door, his purpose was to get back his daughter's money and find out how she was going to pay him for his investment in the van. He denied asking Lugger to destroy phones or that he drew him a diagram of Ms. Fansler's apartment.

Regarding a silencer, appellant said there was no way to put one on the .22.

On the night of March 9 appellant left the house with both guns and the fanny pack. After trying to page Brian he left the nine-millimeter and fanny pack hidden where Brian could find them, intending to page him later about the location. He had the .22 in his sweatshirt pocket, explaining that he took the gun to frighten Ms. Fansler because she was not scared of him and would use the rape allegation to keep him from getting his money.

Once at Ms. Fansler's apartment he slipped in, surprising her. She took off for the bedroom and knocked a lamp over. Ms. Fansler was leaning over; appellant reached around her and said he did not mean to scare her. The gun "went off" as he reached around. They both jumped. Ms. Fansler rushed at appellant. There was a tussle and he dropped the gun as he fell against the dresser. Ms. Fansler landed on appellant. He lifted her to the bed. Ms. Fansler started yelling at him to leave. Appellant heard knocking, knelt to pick up the gun and asked, "[W]here's the money?" The gun was now in his hand near her head. Ms. Fansler pushed appellant. As he stood up to leave, the "gun went off" again. He never put the .22 to her head or pulled the trigger.

Stunned, appellant left through the sliding glass door. He did not recall being chased. He believed he lost the gun when he stumbled. Appellant admitted he paid Gravlee and Ledridge $100 for helping him. He did not tell Gravlee to get rid of the sweatshirt or that he shot Ms. Fansler,[4] and did not tell him anything about the guns.

Appellant did not know Ms. Fansler was pregnant; he would not have confronted her had he known. The discharge of the gun and shooting were accidents. While in jail he told his daughter the death was an accident and he wished it never happened.

During their divorce, Baxman accused appellant of molesting one of the children. There were animosities between them but they dealt with their differences in court. Eventually criminal charges were dismissed. Other women he had lived with had stolen money and/or cars from him. One was Charlotte White, Baxman's sister. During the course of that relationship, White obtained a restraining order against appellant.

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[4] Rather, he told Gravlee he could have the sweatshirt because he no longer wanted it. Further, when Gravlee asked how it went, he said, " 'It was bad, James. It all went wrong.' "

Forensic psychiatrist S. Miles Estner agreed with the Veterans' Administration diagnosis of appellant as suffering from PTSD. PTSD symptoms include hypervigilance, reexperiencing phenomenon, and avoidance phenomenon. Dr. Estner believed that appellant's affliction affected him in stressful situations. In his opinion, appellant could not "think straight" under stress and overreacted to stimuli and stress, rendering him unable to focus his concentration.

F. *Rebuttal*

Forensic psychologist John Podboy opined that the complex nature of the behavior, planning, organization and preparation involved in the crime "point[ed] away from PTSD."

II. DISCUSSION

A. *Insufficient Evidence to Support Fetal Murder Conviction*

Appellant urges reversal of his second degree fetal murder conviction for insufficient evidence of implied malice. That conviction cannot stand.

1. *Background*

Up until 1970, California's murder statute paralleled the common law "born alive" rule, excluding from its scope the act of killing an unborn fetus. At that time, Penal Code[5] section 187 defined "murder" as "the unlawful killing of a human being, with malice aforethought." (Former § 187, enacted in 1872, was amended by Stats. 1970, ch. 1311, § 1, p. 2440 and Stats. 1996, ch. 1023, § 385.) Former section 187, in turn, was taken verbatim from the Crimes and Punishments Act of 1850, the first California statute defining murder. (Stats. 1850, ch. 99, § 19, p. 231.) By the year 1850, the "born alive" common law rule had long taken hold in the United States and it was well settled that an infant had to be born alive for homicide laws to apply. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625-628.) We presume that our Legislature intends to continue relevant common law rules in statutory form when, as here, it couches an enactment in the common law language. (*Id*. at p. 625.)

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[5] All further statutory references are to the Penal Code unless otherwise indicated.

The last case to follow the former statutory born alive rule in California was *Keeler v. Superior Court*, *supra*, 2 Cal.3d 619, in which the defendant intercepted his former wife on a mountain road and attacked her upon visually verifying her advanced state of pregnancy by another man, saying " 'I'm going to stomp it out of you.' " (*Id*. at p. 623.) Ms. Keeler delivered a stillborn fetus whose skull was fractured with consequent cerebral hemorrhaging, due to the force applied to the mother's abdomen. (*Ibid*.) In the defendant's proceeding for a writ of prohibition to prevent the superior court from prosecuting the feticide charge, our Supreme Court held that by declaring murder to be the unlawful killing of a "human being" with malice aforethought, the Legislature did not intend to make the act of killing of an unborn fetus a crime. (*Id*. at p. 628.)

Apparently repelled by the result of the *Keeler* decision, the Legislature acted immediately to amend section 187 to expressly provide that the unlawful killing *of a fetus* with malice aforethought was murder. (See Comment, *Is the Intentional Killing of an Unborn Child Homicide*? (1970) 2 Pacific L.J. 170, 172-175 (hereafter Comment) for a description of the remarkable legislative history of the 1970 amendment to § 187.)

Ours is a narrow feticide statute, encompassing only murder, not the lesser crime of manslaughter.[6] (See *People v. Dennis* (1998) 17 Cal.4th 468, 509.) The legislative history of the 1970 amendment reveals that an earlier version of the amending bill applied to both murder and manslaughter. The legislative decision to leave section 192 alone without the disjunctive "fetus" was consistent with Senate debate that the unlawful killing of a fetus should be confined to murder due to the defendant's extreme culpability and level of purpose. (Comment, *supra*, 2 Pacific L.J. at pp. 174, 181; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1592.) Thus, omission of the word "fetus" from the manslaughter statute involved the exercise of

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[6] Manslaughter is still defined as "the unlawful killing of a human being without malice." (§ 192.)

legislative judgment, not the absence of legislative oversight. (See Comment, *supra*, 2 Pacific L.J. at pp. 172-175, 181; *People v. Apodaca* (1978) 76 Cal.App.3d 479, 487, disapproved on other grounds in *People v. Davis* (1994) 7 Cal.4th 797, 804.)

Years later, in *People v. Davis, supra,* 7 Cal.4th 797 our Supreme Court held that viability is not an element of fetal murder under section 187, subdivision (a). Rather, "the Legislature could criminalize murder of the postembryonic product without the imposition of a viability requirement." (*Id*. at p. 810.)

When the charge is second degree murder of a fetus, malice aforethought must be proved separately as to the fetus. (*People v. Dennis*, *supra*, 17 Cal.4th at pp. 514-515 [assuming also that notion of transferred intent, wherein malice toward mother would satisfy element of malice for fetal murder, does not apply].) Malice may be express or implied. (§ 188.) It is implied "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215; *People v. Jones* (2000) 82 Cal.App.4th 663, 667.) This is the language tracked in CALJIC No. 8.11,[7] the standard instruction defining implied malice and approved in *People v. Dellinger*, *supra*, 49 Cal.3d at pages 1221-1222.

Unlike criminal negligence, the implied malice determination entails a subjective assessment of whether the defendant *actually appreciated* the risk involved. (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.) Stated somewhat differently, implied malice has physical and mental components, "the physical component being the performance of ' "an act, the natural consequences of which are dangerous to life," ' and the mental component being the requirement that the

[7] 6th edition 1996, bound volume, unchanged from 5th edition 1988, bound volume.

defendant ‘ “knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.” ’ ” (*People v. Hansen* (1994) 9 Cal.4th 300, 308.)

In *People v. Brown*, the trial court delivered modified implied malice instructions to refer specifically to a human fetus. (*People v. Brown*, *supra*, 35 Cal.App.4th at p. 1595 & fn. 3) There, the reviewing court sustained the second degree fetal murder conviction on the following evidence: an unprovoked attack by the defendant on the mother, triggered by a phone call reflected on her pager. The defendant repeatedly kicked, hit and punched the mother in the stomach and elsewhere, saying “ ‘Fuck that baby’ ” and “ ‘I’ll kill you.’ ” (*Id*. at p. 1599.) These declarations “evidenced [defendant’s] complete disregard for the harm he was causing both to [the mother] and the fetus. Regardless whether the governing standard be his knowledge of the natural consequences of his acts were dangerous to fetal life or his recognition of the ‘high probability of death’ to the fetus, his intentional, callous and repetitive kicking and punching of a pregnant woman in her abdomen while yelling he neither cared about the baby nor her supported the jury’s conclusion he acted with conscious disregard of the danger to fetal life he was causing.” (*Ibid*.)

2. *Analysis*

On the prosecutor’s motion, the court changed count two from first degree to second degree murder of the fetus and instructed the jury on implied malice.[8] Further, the prosecutor resisted trying the case on a transferred intent theory, making it clear that “[t]ransferred intent is not an issue in second degree murder. It’s not an

[8] Specifically, the court instructed that malice is implied when “one, the killing results from an intentional act; two, the natural consequences of the act are dangerous to human life; and, three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.” Further, the court instructed that “[m]urder of the second degree is the unlawful killing of a human being or fetus with malice aforethought when the perpetrator intended unlawfully to kill a human being or human fetus, but the evidence is insufficient to prove deliberation and premeditation.”

issue in this case at all."[9] Instead, the prosecutor promoted an implied malice/zone of danger analysis.

We agree with appellant that the fetal murder charge does not stand up to the implied malice theory advanced in this case. The evidence supports the physical component, but not the mental component. There is not an iota of evidence that appellant knew his conduct endangered fetal life and acted with disregard of that fetal life. It is undisputed that the fetus was 10 to 13 weeks old; the pregnancy was not yet visible and appellant did not know Ms. Fansler was pregnant.

Relying on *People v. Roberts* (1992) 2 Cal.4th 271, the People insist that appellant should be held liable for the unintended murder of the fetus upon the foreseeability of the consequences of his conduct on March 9. In *Roberts*, the defendant stabbed and wounded a prison inmate in a hallway. The dazed inmate pursued his attackers and fatally stabbed a prison guard before he died. The defendant was convicted of several offenses, including the first degree murders of the inmate and guard.

Roberts is a proximate cause case. The court reviewed the few cases in the annals of American criminal law, where principles of proximate cause assign criminal liability for the death of a third party resulting from a second person's impulsive reaction to the defendant's dangerous act. In each case the defendant was charged with murder but found guilty of manslaughter, or with first degree murder and convicted of second degree murder. (*People v. Roberts, supra,* 2 Cal.4th at pp. 317-320.) Concluding there was insufficient evidence to find the defendant liable for

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[9] We note that the Supreme Court recently held that the doctrine of transferred intent may be applied to unintended victims even when the intended target is killed. (*People v. Bland* (2002) 28 Cal.4th 313, 317, 321-324.) Because the theory of transferred intent was abandoned by the prosecutor, we need not and do not decide whether the reasoning of *Bland* would prevail in a fetal murder case where the pregnancy is undetectable to the human eye and the defendant has no knowledge of it. *Dennis*, in requiring that malice be directed toward the fetus and not just the mother, seems to suggest that the doctrine would be inapplicable.

first degree murder of the guard but sufficient evidence to find that his act was the proximate cause of the guard's murder, the court nonetheless reversed the conviction because of a constitutionally erroneous instruction. (*Id.* at pp. 315, 320-322.)

Roberts does not aid the People. First, this is not a causation case; in particular, this case does not involve issues of a second party's impulsive reaction or an intended victim's killing of a third person. Second, the evidence of causation was deemed sufficient in *Roberts* because the guard was in the vicinity in which *harm foreseeably could occur* as result of a prison stabbing. (*People v. Roberts, supra,* 2 Cal.4th at p. 321.) The People urge us to hang implied malice liability on the theory that it was reasonably foreseeable that Ms. Fansler might be pregnant: "When one starts shooting women of child-bearing years, it is reasonably foreseeable the victim might be pregnant. This is particularly true when a perpetrator shoots a woman whom he knows is fertile, is dating other men, and is presumably sexually active."

We will not adopt a theory that leans more toward strict liability than implied malice. The undetectable early pregnancy was too latent and remote a risk factor to bear on appellant's liability or the gravity of his offense. (See *People v. Roberts*, *supra*, 2 Cal.4th at pp. 319-320.) Contrast the speculative nature of the risk factor here with the classic example of indiscriminate shooting/implied malice recited in *Roberts*: The actor who fires a bullet through a window, not knowing or caring if anyone is behind it, may be liable for homicide regardless of intent to kill. (*Id*. at p. 317.) The risk there is high and patent, not latent, speculative and remote.

Finally and most importantly, were we to adopt the People's position, we would dispense with the subjective mental component of implied malice. Where is the evidence that appellant acted with knowledge of the danger to, and conscious disregard for, fetal life? There is none. This is dispositive.

Avoiding the issue, the People posit that there is no requirement under our fetal murder statute that the defendant display indifference to fetal life, rather than human life in general, arguing that *Dennis* supports this conclusion. Responding to the defendant's argument that the jury instructions were deficient because they did

not separately define malice in terms that related specifically to a fetus, the Supreme Court in *Dennis* held that the instructions as a whole "made [it] plain that malice was a separate element that had to be proved for each of the two murders charged. The trial court instructed the jury that a verdict of guilt of the alleged fetal murder required a finding that defendant killed the fetus with malice aforethought. . . . It is not reasonably likely the instructions misled the jury into thinking it could convict defendant of two murders while finding malice aforethought only as to one victim's death." (*People v. Dennis, supra,* 17 Cal.4th at pp. 514-515.) Far from supporting respondent's theory, the *Dennis* opinion assumes it would be error to instruct the jury that the defendant need not display malice toward the fetus or fetal life generally. (See also *People v. Bunyard* (1988) 45 Cal.3d 1189, 1230-1232 [express malice instructions collectively required that defendant act with specific intent to kill fetus, not just mother]; *People v. Brown*, *supra*, 35 Cal.App.4th at pp. 1595 & fn. 3, 1598-1599 [implied malice instruction modified to refer to human fetus; opinion assumes implied malice must be shown as to fetal life].)

The People also suggest that *People v. Davis, supra,* 7 Cal.4th 797 and *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1158 imply that fetal murder can be found without the defendant's knowledge of the pregnancy or awareness of risk of harm to fetal life. However, *Davis* is a felony-murder case; malice is not an element of felony murder. (*People v. Dillon* (1983) 34 Cal.3d 441, 475.) Moreover, the defendant in *Henderson* knew the victim mother, who was carrying a 27 to 28 week-old fetus. (*People v. Henderson, supra,* 225 Cal.App.3d at pp. 1137, 1140-1141.) The defendant had lived with the mother and her husband some six weeks before robbing and killing them and the fetus. (*Id*. at pp. 1143-1144.) Thus, there was ample evidence to infer that the defendant was well aware of the pregnancy.

Finally, the People offer the public policy argument that to require defendant to harbor implied malice toward fetal life would unduly denigrate fetal life. They throw out the example of a gang member who kills a rival gang member in a drive-by shooting, accidentally also shooting a pregnant woman, resulting in death of the fetus

upon miscarriage. Absent conscious disregard for fetal life, the defendant would not be liable for fetal homicide. If the same perpetrator had accidentally killed another human, there would be no question of implied malice toward the unintended human victim. Thus, according to respondent, the fetus is afforded less protection than human life, and the defendant gets a "free ride" for the fetal death.

First, this is not our case. The example invokes a zone of danger analysis based on indiscriminate, provocative drive-by shooting. The risk stemming from the act of shooting in the two scenarios is very different, as is the analysis of culpability. Second, unknown fetal life and human life are also very different in terms of the risk of endangerment to life *appreciated by a defendant*. As contrasted to the risk to human life, the risk to unknown fetal life is latent and indeterminate, something the average person would not be aware of or consciously disregard.

In any event, as in *Davis*, a defendant may be prosecuted for fetal murder regardless of knowledge of the pregnancy when the facts support a felony-murder theory. This is because the Legislature has designated certain felonies so inherently dangerous that death in the course of their commission or completion constitutes first degree murder. (§ 189; *People v. Roberts*, *supra*, 2 Cal.4th at p. 317.) Ironically, murder itself is not one of them.

Third, the Legislature has some experience with the issue of knowledge of pregnancy with respect to the enactment of section 12022.9, the sentence enhancement for infliction of injury upon a pregnant woman resulting in termination of the pregnancy. (§ 12022.9, subd. (a).) While not an alternative to the charge of fetal murder in violation of section 187, section 12022.9 imposes a five-year enhancement for any felony committed against a pregnant woman resulting in termination of her pregnancy. The enhancement only applies where the offender "knows or reasonably should know that the victim is pregnant." (§ 12022.9, subd. (a).)

For all these reasons, we conclude the second degree fetal murder conviction cannot stand and must be reversed for insufficient evidence.[10]

B. *Prosecutorial Misconduct*[*]

Appellant maintains the prosecutor committed prejudicial misconduct by stating appellant raped Ms. Fansler and otherwise insinuating the rape as fact during trial, in violation of court orders. Prior to trial the court ruled that the prosecution could introduce evidence that Ms. Fansler made an allegation of rape, but not to show the truth or fact of rape.

Despite this ruling, during opening statements the prosecutor said: "What makes this case so much more tragic is that Miss Fansler tried so hard not to be Mr. Taylor's victim. When Miss Fansler broke up with Mr. Taylor, she moved away, she changed her job. And when Mr. Taylor raped her on January 1st, 1999, she reported that to the police, cooperated with the police." The court admonished the jury that it would strike comments with respect to the fact that a rape occurred, explaining: "[W]e're dealing only with an allegation; not the fact that a rape did . . . occur."

The prosecutor asked the first witness, a police officer who responded to the motel, whether he believed a crime had occurred and what was the crime. Sustaining a defense objection but not the call for mistrial, the court warned the prosecutor he was getting close to mistrial.

Shortly thereafter, the court also sustained a defense objection to the prosecutor's query of a witness as to whether Ms. Fansler's subsequent statements about the January 1 incident were consistent with police reports. Finally, during cross-examination of appellant regarding the rape allegation, the prosecutor

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[10] Because the fetal murder fails for lack of substantial evidence, we need not address appellant's additional claim of reversible error in denying his motion to dismiss that count for vindictive pretrial charging.

[*] See footnote, *ante*, page 1.

commented: "I'm not going to ask—we're not here to try that case today." No objection was lodged.

At the close of trial the defense moved for a new trial on several grounds, including willful and prejudicial prosecutorial misconduct in asserting and insinuating the truth of the rape. Denying the motion, the court indicated that the admonitions were sufficient to cure any prejudice.

Appellant renews his objections here.

A prosecutor's improper remarks can infect a trial with unfairness, resulting in denial of due process. But conduct that does not render the trial fundamentally unfair will amount to prosecutorial misconduct under state law only if it entails deceptive or reprehensible methods to try to persuade the court or jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) To preserve a prosecutorial misconduct claim for appeal, the defense must timely object and request an admonition. Otherwise, we review the point only if an admonition would not have cured the harm. (*Ibid*.) Finally, we will reverse a judgment for prosecutorial misconduct only if it appears reasonably probable that the misconduct contributed to the verdict. (*People v. Sanchez* (1995) 12 Cal.4th 1, 66, 69.)

There is no question but that the prosecutor pressed the trial court's ruling beyond its limits. The first and most glaring example was countered with an effective admonition. This was not a situation of a bell that could not be unrung. The second breach occurred with pressing a witness about whether a crime occurred on January 1. Objection was sustained in time to stop a specific description of the crime, but not the witness's assessment that a crime had occurred. After a brief recess, questioning resumed as to an allegation of rape, not the fact of rape. Concerning the third instance about consistent statements, objection was sustained prior to enlisting the answer. And the final aside during cross-examination was just that—an aside that did not amount to much.

While, like the trial court, we are not pleased with the prosecutor's pursuit of the forbidden, we do not believe that this conduct—in light of counterbalancing

admonitions, limiting instructions[11] and rulings sustaining objections as well as the evidence against appellant—prejudiced him. In other words we cannot conclude on this record that but for the improper questions and argument, it is reasonably probable the jury would have entertained a reasonable doubt as to whether appellant acted with malice in murdering Ms. Fansler. To hold otherwise we would have to ignore the evidence of appellant's threats to Ms. Fansler and others; Ms. Fansler's fear of him; the car chases; weapon preparation; the ex-wife's accusations of child molestation; appellant's admission that his former sister-in-law obtained a restraining order against him; and the fact that Ms. Fansler obtained a restraining order against appellant. This we will not do.

C. *Tailgating Incident*[*]

Evidence Code section 1370 allows a party to introduce statements of an unavailable declarant concerning infliction or threat of physical injury upon the declarant, under specified circumstances.[12] Evidence Code section 1109 in turn

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[11] The jury was instructed as follows: "If an objection was sustained to a question[,] do not question what the answer might have been. Do not speculate as to the reason for the objection. [¶] Do not assume to be true any insinuation suggested by a question as asked a witness. A question is not evidence and may be considered only as it helps you understand the answer."

[*] See footnote, *ante*, page 1.

[12] Specifically, the statute provides in relevant part: "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: [¶] (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury. . . . [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a . . . law enforcement official. [¶] (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: [¶] (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested. [¶] (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. [¶] (3) Whether the

permits admission of evidence to show propensity to commit domestic violence when the underlying offense involves domestic violence.[13] Here, relying on these statutes, the People prevailed in the admission of Ms. Fansler's statements to Deputy Fletcher describing the January 20 tailgating incidents. The court ultimately instructed the jury that the tailgating incident could be considered as domestic violence propensity evidence pursuant to Evidence Code section 1109.

1. *Evidence Code Section 1370 Does Not Denigrate Defendant's Confrontation Rights and Was Properly Applied in this Case*

Appellant first attacks the constitutionality of Evidence Code section 1370. He argues that the statute is a "novel attempt to use inherently untrustworthy evidence without the safeguards of face to face confrontation and cross-examination."

The admission of hearsay against an accused bears sufficient indicia of the reliability to survive a confrontation clause challenge where the evidence (1) comes within a firmly rooted exception to the hearsay rule; or (2) contains a particularized guarantee of trustworthiness rendering adversarial testing of little consequence to the

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statement is corroborated by evidence other than statements that are admissible only pursuant to this section." (Evid. Code, § 1370, subds. (a)-(b)(3).)

[13] Subject to exceptions not pertinent to this case, Evidence Code section 1109 provides: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).) Pursuant to subdivision (d) of Evidence Code section 1109, "domestic violence" is defined pursuant to section 13700 as follows: " 'Domestic violence' means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." (§ 13700, subd. (b).) Finally, "abuse" is defined as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (*Id*. at subd. (a).)

reliability of the statement. (*Lilly v. Virginia* (1999) 527 U.S. 116, 125; *Idaho v. Wright* (1990) 497 U.S. 805, 815-816.)

Recently, in *People v. Hernandez* (1999) 71 Cal.App.4th 417, 424 the Fourth District Court of Appeal held that Evidence Code section 1370 is similar to the firmly rooted hearsay exception for spontaneous declarations and moreover comes equipped with particularized guarantees of trustworthiness. Assurances of reliability include requirements that the statement be made (1) at or near the time of the incident by one who directly experienced the incident, (2) to a police officer, or made in writing or electronically recorded, (3) under circumstances pointing to its trustworthiness, including whether (a) the statement was made in contemplation of litigation; (b) the declarant had a bias or motive to fabricate; and (c) evidence admissible independent of section 1370 corroborates the statement. Moreover, while corroborating evidence does not bear on the *inherent trustworthiness* of a hearsay statement (*Idaho v. Wright*, *supra*, 497 U.S. at pp. 822-823), inclusion of that "indicia" in the Evidence Code section 1370 itemization does not render the statute unconstitutional. "[S]ection [1370] still requires the essential indicia of trustworthiness and it suggests other legitimate factors which may establish that." (*People v. Hernandez*, *supra*, 71 Cal.App.4th at p. 424.)

Appellant suggests that *Hernandez* was wrongly decided. We disagree. To reiterate, the statute calls for sufficient signs of reliability, to be determined by the circumstances of the particular case.

Turning to those particulars, appellant also urges that Ms. Fansler's statements to the police do not bear sufficient indicia of reliability. We disagree.

Like the victim in *Hernandez*, Ms. Fansler was upset and crying when she came to the sheriff's office. (*People v. Hernandez*, *supra*, 71 Cal.App.4th at p. 425.) She told the deputy she had been followed by appellant and was scared of him. The reported incident, which had just occurred, was the second instance of tailgating that day. The second incident had taken place "just prior to" the first, broken by the time it took her to pick up her daughters from school. There were two points when she

estimated the speed at 75 miles per hour. At one point appellant backed off but then approached the rear end of her vehicle. Like the spontaneous declaration, Ms. Fansler's statements were made " 'while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.' " (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177.)

Appellant argues that the statements were untrustworthy, asserting that Ms. Fansler's "entire purpose in reporting the incident was to enforce a [temporary restraining order], or to 'document' . . . the incident for purposes of the pending rape charges." This assertion is nothing but speculation and ignores the timing of the statement and Ms. Fansler's emotional state and demeanor as observed by the deputy. Moreover, she had already "documented" the alleged rape. Further, the fact of the charges themselves provided appellant with a motive to engage in behavior like tailgating to intimidate Ms. Fansler into dropping the charges. Additionally, that Ms. Fansler sought Deputy Fletcher's assistance in serving the temporary restraining order on appellant goes to her state of mind of fear. She did not have to fabricate anything to serve the temporary restraining order because the court had already granted it.

Finally, appellant contends that the tailgating evidence did not constitute infliction or threat of physical injury and hence does not qualify for admission under Evidence Code section 1370. First, Ms. Fansler, the declarant, perceived the episode as constituting a threat of physical injury; she was upset, crying and scared. Second, it is not just a matter of the anonymous high-speed tailgater. He was Ms. Fansler's ex-boyfriend who had threatened to kill her and anyone close to her, and who had told her friends that if he could not have her, no one else could. Third, she reported that appellant was swerving behind her, backed off and then approached the rear of her car. The reported conduct qualifies as a threat of physical harm.

2. *The Court Properly Admitted Tailgating Evidence under Evidence Code Section 1109*

Appellant also maintains that the court erred in admitting the tailgating evidence pursuant to Evidence Code section 1109. First, he offers a variant of the above argument, contending the evidence did not constitute domestic violence within the meaning of section 1109. Appellant finds it "important" that the term "injury," as defined in the battery statute, means "any physical injury which requires professional medical treatment." (§ 243, subd. (f)(5).) Regardless of whether this definition would be read into section 1370 and in turn read into Evidence Code section 1109, what is clear is that evidence of attempts to cause injury to a former cohabitant, or of placing the former cohabitant in reasonable apprehension of imminent serious bodily injury, are admissible when the accused is charged with an offense involving domestic violence. Had appellant caused Ms. Fansler to lose control of her vehicle, there would be no question of injuries requiring professional medical attention. To repeat, against the background of verbal threats, the conduct of tailgating Ms. Fansler at a high speed, on more than one occasion, and at one point swerving behind her suffices to bring the episodes within Evidence Code section 1109.

Appellant also complains that the trial court abused its discretion in admitting the evidence in light of Evidence Code section 352 concerns. In order to admit propensity evidence pursuant to section 1109, the trial court must undertake a section 352 assessment to determine whether the uncharged acts of domestic violence are more prejudicial than probative. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095.)

First, the record shows that the trial court reviewed Evidence Code section 1109 when evaluating appellant's evidentiary challenge and engaged in colloquy with the parties about the evidence. Thus, the court was aware of the statutory terms and its duty to balance the probative value of the evidence against its prejudicial effect. A trial judge need not expressly weigh probative value against prejudice or even expressly state that he or she has done so. (*People v. Crittenden* (1994) 9

Cal.4th 83, 135.) What is important is that the record manifest the court's exercise of discretion available under Evidence Code section 352. (*In re Romeo C*. (1995) 33 Cal.App.4th, 1838, 1845.)

Second, the evidence was highly relevant, underscoring appellant's anger and obsession toward Ms. Fansler for leaving him and accusing him of rape. This and other evidence refuted appellant's defense that the shooting was accidental. Moreover, it was not so inflammatory as to provoke an emotional response among jurors, causing them to prejudge appellant on the basis of extraneous factors and use the evidence for an illegitimate purpose. (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

3. *Evidence Code Section 1109 is Constitutional*

Appellant also attacks the constitutionality of section 1109, asserting that it permits conviction on the basis of character evidence and unduly reduces the People's burden of proof, all in violation of due process. Recently our Supreme Court rejected a similar due process challenge to Evidence Code section 1108, the sexual offense analogue of section 1109. The state's high court held that the statute respects the due process clause by preserving trial court discretion to exclude propensity evidence under the Evidence Code section 352 balancing test. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907, 916-917.) As well, the *Falsetta* court dismissed an argument that section 1108 improperly altered the prosecutor's burden of proof: " 'While the admission of evidence of the uncharged sex offense may have added to the evidence the jury could consider as to defendant's guilt, it did not lessen the prosecution's burden to prove his guilt beyond a reasonable doubt.' " (*Id*. at p. 920.) We join the other Courts of Appeal that have uniformly rejected constitutional challenges to Evidence Code section 1109 in reliance on *Falsetta*. (See *People v. Brown* (2000) 77 Cal.App.4th 1324, 1328-1329, 1333-1334*; People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-2030; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420.)

4. *CALJIC No. 2.50.02*

Finally, appellant assails the instructions on propensity evidence, claiming they violated his due process rights by letting the jury use the propensity evidence "as a link in the direct chain of evidence to convict." He complains that the instruction fails to distinguish the lesser standard of proof to establish the prior acts from the greater standard applicable to the ultimate inference of guilt.

The court instructed the jury in language tracking CALJIC No. 2.50.02 (2000 rev.): "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is [accused]. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. The weight and significance, if any, are for you to decide."[14]

This instruction paralleled the 1999 revision to CALJIC No. 2.50.01 (prior sexual offenses) approved in dictum by our Supreme Court in *Falsetta*. The court allowed that the revised instruction contained language appropriate for cases involving admission of propensity evidence and adequately set forth the controlling statutory principles. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 922-924.) Further,

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14 The Supreme Court has granted review in two cases reaching opposite conclusions regarding the propriety of the 1999 revision of CALJIC No. 2.05.01: *People v. Reliford*, review granted February 13, 2002, S103084 (instruction insufficient); *People v. Haselman*, review granted May 1, 2002, S105031, and further action deferred pending disposition in *People v. Reliford* or pending further order of the court (no instructional error). Review was also been granted in *People v. Sizemore* on September 18, 2002, S108717, a case finding instructional error concerning the identical instruction offered here.

the revisions would help "assure that the defendant will be tried and convicted for his present, not his past, offenses." (*Id*. at p. 923.)

In *Escobar*, involving a pre-1999 version of CALJIC No. 2.50.02,[15] this court acknowledged the *Falsetta* dictum, explaining that the court in *Falsetta* "expressed confidence" that the 1999 revision eliminated the flaw in the pre-1999 instruction. (*People v. Escobar*, *supra*, 82 Cal.App.4th at p. 1101.) Continuing, we held: "[T]he flaw in the pre-1999 version of CALJIC No. 2.50.02 pales to utter insignificance when we consider the giving of that instruction in light of the jury instructions as a whole—as we must. [Citations.] That is, viewing CALJIC No. 2.50.02 in the context of the entire body of proper instructions delivered to the jury in this case—including CALJIC Nos. 2.90 (requirement of proof beyond a reasonable doubt of each element of the offense), 8.20 (elements of first degree murder), and 2.27 (duty to consider all evidence upon which proof of a fact depends)—we are satisfied that there was no significant likelihood the jury would return a conviction based on evidence of uncharged acts of domestic violence alone." (*People v. Escobar*, *supra*, 82 Cal.App.4th at p. 1101.)

The court in *People v. Brown*, *supra*, 77 Cal.App.4th 1324, 1335 concluded that instructions which "essentially" tracked language that *Falsetta* considered adequate "did not allow the jury to infer that [defendant] committed the charged crime solely from proof that he committed the prior acts of domestic violence. To the contrary, the instructions expressly provided that 'evidence that the defendant committed prior offenses involving domestic violence is not sufficient by itself to prove that he committed the charged offenses.' " Moreover, the instructions as a

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[15] The instruction there stated: "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type offense. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime with which he is now accused. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose." (*People v. Escobar*, *supra*, 82 Cal.App.4th at p. 1094, fn. 5.)

whole, coupled with closing arguments, delivered a consistent message that the jury must find defendant guilty beyond a reasonable doubt and counsel never hinted that guilt might be based on a lesser standard of proof. (*Ibid*.)

Similarly rejecting the defendant's due process challenge to the 1999 revision of CALJIC No. 2.50.01, the court in *People v. Hill* (2001) 86 Cal.App.4th 273, 278 regarded the instruction as proper since it specifically advised the jury that even if it found the defendant committed the prior offenses and inferred he had the disposition to commit similar crimes and was likely to commit the charged offense, that inference was insufficient to prove beyond a reasonable doubt that he committed the charged offenses. Moreover, the court also cautioned the jury that each element of the charged offenses must be proven beyond a reasonable doubt and that the lesser preponderance burden applied only to proof of prior offenses. (*Id*. at pp. 278-279.)

Finally, in *People v. James* (2000) 81 Cal.App.4th 1343, a case involving the 1997 version of CALJIC No. 2.50.02, the court noted that the 1999 revision was an improvement, but with some reservation: "However, to the degree it still suggests that other offense evidence is relevant only to infer guilt from propensity, we believe the instruction simultaneously overstates and unduly limits the use of such evidence. . . . We believe an instruction in general terms would be more appropriate, leaving particular inferences for the argument of counsel and the jury's common sense. At a minimum, deleting the words " 'and did commit' " from the standard instruction would remedy many of the concerns addressed above." (*Id*. at p. 1357, fn. 8.)

Appellant's concern is that the instruction still fails to distinguish the lesser standard of proof to establish prior conduct from the greater standard applicable to the ultimate propensity and inference of guilt. The instruction is not perfect. However, we believe it is adequate for the reasons expressed in *Falsetta*, *Escobar*, *Brown* and *Hill*. Further, the instructions as a whole,[16] coupled with argument to the

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[16] Pertinent instructions included the definition of reasonable doubt and the People's burden to prove appellant guilty beyond a reasonable doubt.

jury from counsel for both sides, reinforced the message that the jury must find appellant guilty beyond a reasonable doubt, not by a preponderance of the evidence. There was no due process violation here.

D. *No Sua Sponte Duty to Instruct on Voluntary Manslaughter**

The trial court must, on its own initiative, instruct the jury on lesser included offenses " 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' " (*People v. Barton* (1995) 12 Cal.4th 186, 194-195, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) The duty to instruct sua sponte arises "only when the evidence is substantial enough to merit consideration by the jury." (*People v. Barton, supra,* 12 Cal.4th at p. 195, fn. 4.) When there is evidence that the defendant is guilty of a lesser included offense but not the crime charged, the court must instruct on the lesser offense as an alternative theory even though such instructions are inconsistent with the defendant's chosen defense. (*Id*. at p. 195.)

A defendant who intentionally and unlawfully kills another but lacks malice is guilty of the lesser included offense of voluntary manslaughter. (See § 192.) But such a defendant "lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense . . . .' " (*People v. Barton*, *supra*, 12 Cal.4th at p. 199.) A heat of passion state exists "if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . . ." ' [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any ' " ' [v]iolent, intense, high-wrought or enthusiastic emotion' " '

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* See footnote, *ante*, page 1.

[citations] other than revenge [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

Provocation need not occur instantaneously; it may occur over a period of time. (*People v. Wharton* (1991) 53 Cal.3d 522, 569-571.) Nonetheless, the killing is not voluntary manslaughter if sufficient time for passion to subside and reason to return has elapsed between the provocation and the fatal blow. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) Finally, unless it appears from the prosecution's case that the defendant committed the killing in the heat of passion and upon sufficient provocation, it is the defendant's burden to raise a reasonable doubt that malice was present. (*People v. Sedeno, supra,* 10 Cal.3d at p. 719; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1552.)

Voluntary manslaughter instructions would have been inappropriate in this case. Appellant claimed the shooting was accidental. No one else was present. Robert heard muffled screams and moving around inside the apartment, but no yelling or conversation. Appellant testified to a struggle, but he is not asserting unjustified self-defense. There was no evidence presented to the jury of provocatory conduct on the part of the victim, let alone sufficient provocation to arouse in a reasonable person an overwhelming passion that overcomes reason. Appellant testified to his frustrations about retrieving missing money and his down payment on the van. However, he does and could not in reason argue that these purported circumstances were enough to arouse such passions in an ordinary person as to displace judgment and render him or her liable to rashly gun down a defenseless woman. (See *People v. Dixon, supra,* 32 Cal.App.4th at p. 1551.)

III. DISPOSITION

The judgment is affirmed as to the murder of Ms. Fansler but reversed as to the fetal murder count.

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Reardon, J.

We concur:

_____
Kay, P.J.

_____
Rivera, J.

Trial court:	Mendocino County Superior Court
Trial judge:	Hon. Henry K. Nelson
Counsel for appellant:	Joseph Shipp
Counsel for respondent:	Bill Lockyer Attorney General Robert R. Anderson Chief Assistant Attorney General Ronald A. Bass Senior Assistant Attorney General Eric D. Share Supervising Deputy Attorney General Catherine A. McBrien Deputy Attorney General

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